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IN THE
Supreme Court of the United States

October Term, 1958

No. ~~9-54~~ 54

UNITED STATES OF AMERICA,

Appellant,

v.

RADIO CORPORATION OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania.

MOTION TO AFFIRM.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 943.

UNITED STATES OF AMERICA,

Appellant,

v.

RADIO CORPORATION OF AMERICA AND NATIONAL
BROADCASTING COMPANY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO AFFIRM.

Radio Corporation of America and National Broadcasting Company, Inc., pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the district court be affirmed.

STATEMENT.

This case presents a very simple factual situation and a narrow and clear legal issue. The district court's decision dismissing the Government's antitrust suit was rendered on the basis of a stipulation of facts agreed to by all parties. (A copy of the stipulation is attached to this motion as Appendix A, p. 13 *infra*).

National Broadcasting Company, Inc. (hereafter called NBC) and Westinghouse Broadcasting Company (hereafter called WBC) entered into an agreement which provided

that, subject to the approval of the Federal Communications Commission (hereafter called FCC), NBC would acquire WBC's television and radio facilities in Philadelphia (WPTZ and KYW, now WRCV-TV and WRCV) in exchange for NBC's television and radio facilities in Cleveland plus \$3,000,000 in cash. The agreement was dated May 16, 1955 (Stip. ¶ 1 at p. 13 *infra*.)

Under the Communications Act of 1934 (47 U. S. C. §§ 151 *et seq.*), the exchange could not take place unless the FCC found it would serve the public interest. 47 U. S. C. § 310(b). Both WBC and NBC filed applications for FCC approval on June 15, 1955. As required by Section 308(b) of the Act, these applications set forth detailed information concerning the qualifications of WBC and NBC, the nature and terms of the proposed transaction, and each applicant's reasons for requesting approval (Stip. ¶ 2 at p. 13 *infra*).

The FCC conducted an extensive investigation of the proposed station exchange, including the negotiations leading to it. Among other things, the FCC interviewed the WBC and NBC officials involved, as well as all other persons who might have relevant information, and examined in detail all documentary material relating to the transaction. Complete reports of this investigation were prepared and considered by the Commission (Stip. ¶¶ 3, 7 at p. 14 *infra*).

On August 12, 1955, the FCC notified the Antitrust Division of the Department of Justice that the exchange applications were pending and that they raised possible antitrust questions (Stip. ¶ 4 at p. 14 *infra*). Thereafter, the FCC kept the Justice Department fully informed of the facts in its possession relating to the exchange and of the status of the WBC-NBC application (Stip. ¶ 11 at p. 15 *infra*).

In October of 1955, the FCC formally reviewed the exchange applications. Three of the seven Commissioners

avored an immediate grant of these applications, but the majority felt that the FCC required further information before taking final action. The Commission's Secretary was therefore directed to issue letters to WBC and NBC pursuant to Section 309(b) of the Communications Act. These letters stated the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the FCC requested further information (Stip. ¶ 5 at p. 14 *infra*).

WBC and NBC answered these inquiries separately, furnishing detailed data. These replies were filed under cover of a joint letter of transmittal, dated November 10, 1955, in which both WBC and NBC urged the Commission to approve the trade as being in the best interests of both companies and consistent with the public interest (Stip. ¶ 6 at p. 14 *infra*).

The record before the FCC was complete. It included, among other things, all of the evidence relating to all of the antitrust issues presented by the complaint in this action (Stip. ¶ 7 at p. 14 *infra*).

On December 21, 1955, the FCC approved the exchange as being in the public interest (Stip. ¶ 10 at p. 15 *infra*). In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws (Stip. ¶ 8 at p. 15 *infra*). Its approval was a valid exercise of its jurisdiction and was in accordance with the Communications Act and the FCC's own rules, regulations and policies (Stip. ¶ 10 at p. 15 *infra*).

The Justice Department had the right to participate formally in the proceeding before the FCC and to oppose the FCC's approval of the exchange on the same grounds upon which plaintiff now asks the court to annul that approval. Plaintiff admits it had this right but did not exercise it. Nor did it exercise any of the administrative or judicial remedies admittedly available to it for obtaining

reconsideration or judicial review of the FCC's decision (Stip. ¶ 12 at p. 15 *infra*). Nor did anyone else oppose the application for approval of the transaction.

Acting in reliance on the FCC's approval, WBC and NBC effected the exchange on January 22, 1956 (Stip. ¶ 13 at p. 16 *infra*).

Almost a year later, i.e., on December 4, 1956, the United States, acting through the Antitrust Division of the Department of Justice, filed a civil suit under Section 4 of the Sherman Act against NBC and its parent, Radio Corporation of America (hereafter called RCA). (A copy of the complaint is attached hereto as Appendix B, p. 17 *infra*.) The complaint alleged that the station exchange transaction was part of a "conspiracy" between NBC and RCA and that the station exchange agreement, of itself, was a contract in unreasonable restraint of trade in violation of Section 1 of the Sherman Act (¶¶ 18, 19, 21 at pp. 22-23 *infra*).

The specific relief requested was that the court declare the alleged "conspiracy" and the station exchange contract to be in violation of Section 1 of the Sherman Act and "order such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate" (¶¶ 1, 2 at p. 24 *infra*).

In dismissing the complaint, the district court (Kirkpatrick, *Ch. J.*) held that:

(1) It had no jurisdiction to set aside or override the action of the FCC;

(2) The FCC's determination (concededly within the scope of its statutory duty) that the exchange transaction was in the public interest was a complete refutation of and defense against any charge that the exchange constituted an unreasonable restraint of trade; and

(3) Controlling principles of equity required denial of equitable relief to plaintiff.

ARGUMENT.**I.**

In its jurisdictional statement, appellant attempts to meet grounds (1) and (2) of the district court's decision by essentially semantic arguments. Plaintiff contends that the decision permits the FCC to grant "exemption" or "immunity" from the antitrust laws and that it strips the Attorney General and the district courts of their function to "enforce" those laws. Chief Judge Kirkpatrick's rejection of these arguments was manifestly sound.

The court below recognized the fundamental fact that, as the Government had expressly stipulated, "In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws." (Stip. ¶ 8 at p. 15 *infra*). By Section 313 of the Communications Act, which expressly makes the antitrust laws applicable to broadcasting, the FCC is precluded from finding that any transaction which constitutes an unreasonable restraint of trade is in the public interest. Therefore, a finding that a transaction is in the public interest necessarily implies the subsidiary finding that such a transaction is not an unreasonable restraint of trade.

If a transaction did constitute an unreasonable restraint of trade, a conclusion by the FCC that it was in the public interest would be erroneous as a matter of law. An order posited on such finding could and would be set aside by the Court of Appeals for the District of Columbia in a statutory appeal under Section 402(b) of the Communications Act. But no other court has the power to restrain or annul action taken pursuant to FCC authorization.¹ **Venner**

v. Michigan Central R.R., 271 U. S. 127, 130-131 (1925); **Lambert Run Coal Co. v. Baltimore and Ohio R.R.**, 258 U. S. 377, 381-382 (1922). The Court of Appeals for the District of Columbia is the only avenue for setting aside an FCC authorization. **Black River Valley Broadcasts, Inc. v. McNinch**, 101 F. 2d 235, 237-238 (D. C. Cir. 1938), *cert. denied*, 307 U. S. 623 (1939); **Monocacy Broadcasting Co. v. Prall**, 90 F. 2d 421, 424 (D. C. Cir. 1937).

Approaching the problem from either the "jurisdictional" or the "substantive" point of view, the Government's antitrust action must fail. A federal district court is without jurisdiction to annul or set aside the FCC's order or action taken pursuant thereto, and the Commission's determination that the transaction is in the public interest is a complete defense on the merits to a charge that the identical transaction constitutes an unreasonable restraint of trade. The holding of the court below, therefore, is logically and legally unassailable.

The apparent disclaimer by FCC counsel of the Commission's obligation to deny approval of any transaction which itself would constitute a violation of the antitrust laws (Supp. Mem.²) cannot, of course, alter the congressional mandate imposing this obligation on the Commission.

1. The power of a district court under section 313 to order revocation of a broadcast license as an additional penalty for a broadcaster's violation of the antitrust laws is in no way inconsistent with this general rule. In revoking a license prospectively, the district court neither passes on nor is concerned with the propriety of the Commission's issuance thereof; the district court merely determines that revocation of the license is an appropriate sanction for an antitrust violation, by the licensee, bearing no direct relationship to the transaction approved by the Commission.
2. Examination of the Rules of this Court fails to disclose any provision authorizing the filing of a brief or statement of position by the FCC, which is not a party to this litigation, in connection with a jurisdictional statement.

The FCC's plaintive plea against "itself becoming a forum for antitrust litigation" (Supp. Mem. 5) is hardly compelling when, as in this case, its position amounts to an abdication in favor of the district courts of a major portion of the Commission's exclusive licensing function. The professed fear of FCC counsel that the decision in this case "would bog it down in extended trials and frustrate the Commission's performance of its assigned duties" (Supp. Mem. 5) obscures the limited nature of the district court's holding. The district court did not hold that the FCC is required, or even authorized, to adjudicate whether an applicant has been guilty of any antitrust violations. The court held simply that the Commission may not license or approve a particular transaction which itself constitutes an antitrust violation.³ As to all other antitrust questions the FCC has only a collateral interest insofar as violations bear on an applicant's character qualifications. In considering applications before it, the FCC may refuse to examine the merits of pending antitrust actions involving the applicant but having no direct bearing on the particular application.

Appellant attempts to avoid the dismissal of its complaint, which inescapably flows from the district court's cogent analysis, by adverting to generalized conclusory allegations in the complaint of "a broad and continuing conspiracy, of which the exchange agreement was only one

3. The Commission itself followed this approach in the present case, when, in its letter requesting further information from the parties before approving the exchange, it said: "The Commission is also concerned as to whether National Broadcasting Company used its power to grant or withhold network facilities as an instrument to persuade Westinghouse to accept the proposed Philadelphia-Cleveland exchange. The Commission is additionally concerned with the problem of whether the acquisition by National Broadcasting Company of stations in Philadelphia and Westinghouse Broadcasting Company of stations in Cleveland would substantially lessen competition or tend to create a monopoly in the broadcasting field contrary to existing law."

step" (Jur. St. 12). Neither in the complaint nor in the jurisdictional statement is there even a remote hint as to the nature of any other acts performed in furtherance of or pursuant to the alleged general conspiracy. The district court should not retain jurisdiction to try an antitrust suit where the **only** act alleged to establish an illegal conspiracy is a perfectly lawful act performed pursuant to express governmental approval.⁴

The complaint alleges that the conspiracy "consisted of a continuing agreement and concert of action between the defendants **FCA** and **NBC** to obtain VHF television station ownership for **NBC** in five of the eight primary markets" (¶ 19 at p. 23 *infra*).⁵ But the law is clear that **NBC** cannot acquire any station without approval of the **FCC**. If and when **NBC** should seek **FCC** authorization to secure a station in any other market, the Government, through the Department of Justice, will have full opportunity to oppose, as it concedes it had in connection with the present transaction (Stip. ¶ 12 at p. 15 *infra*). As in the present situation, the **FCC** cannot legally grant approval of any future application if the transaction involved constitutes a violation of the antitrust laws.

By alleging a continuing conspiracy to acquire additional stations in the future, appellant attempts to oust the **FCC** of its jurisdiction to pass on possible future transactions within the Commission's statutory jurisdiction. The Government's position in this case amounts to a bypassing of the Commission and the substitution of a federal district court in the Commission's statutory role as the arbiter of the public interest in the field of television licensing. A district court manifestly should not at this time consider

4. In its brief in the court below, the Government frankly stated that, "If defendants' affirmative defenses have merit in law, this complaint should be dismissed now."

5. **NBC**'s VHF television station ownership prior to the transaction here involved is described in paragraph 15 of the complaint, p. 22 *infra*.

whether the parties may be engaged in an agreement pursuant to which some time in the future they may conceivably apply to the FCC for approval of a transaction which the FCC would be required to deny because the transaction would contravene the antitrust laws. It is inconceivable that a court could now issue a blanket injunction against NBC's filing applications with the FCC in the future. Yet that would be precisely the effect of granting the Government's frank request that the court "require judicial approval of any further acquisitions by NBC of any television station in the eight primary markets" (Jur. St. 6). It is strange, to say the least, that the FCC would support an interpretation of the law as authorizing a district court to enjoin the Commission from performing its express statutory duty to grant or refuse broadcast licenses in the exercise of its trained and specialized discretion.

The patent fallacy of appellant's position is perhaps fully demonstrated by the statement in the conclusion of its jurisdictional statement that appellees "for the purposes of this appeal, must be assumed to have violated" the Sherman Act. As a matter of law, however, the record conclusively demonstrates that NBC* has not violated the Sherman Act since admittedly it did only what the FCC authorized after full consideration of all the evidence relevant to the present antitrust issues.

II.

Appellant has stipulated that the Department of Justice was officially notified by the FCC of the pendency of the application for approval of the station exchange (Stip. ¶ 4 at p. 14 *infra*); that it conferred and exchanged information with the FCC, relating to the transfer and was kept

6. The charge against RCA presumably is that it is the parent of NBC. If NBC has not violated the Sherman Act, clearly RCA has not.

fully informed of the evidence (§ 11 at p. 15 *infra*), which included "all of the evidence relating to all of the antitrust issues presented by the complaint in this action" (§ 7 at p. 14 *infra*); and that "the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At no time did the Department of Justice exercise any of these rights" (§ 12 at p. 15 *infra*).

Relying on the FCC's approval, granted more than four months "after the Antitrust Division had been officially notified of the proposed transaction and alerted for possible antitrust features", the parties consummated a transaction which "involved not only an exchange of millions of dollars worth of property but \$3,000,000 in cash, together with extensive changes in personnel, organization and operating procedures" (Opinion, Jur. St. 22).

On these conceded facts, Chief Judge Kirkpatrick concluded that appellant, as a litigant appealing to the discretion of the chancellor, was not entitled to equitable relief.

In so holding, the court followed the mandate of this Court in very similar situations. The court's action was in direct conformity with the express holding of this Court in **Hecht Co. v. Bowles**, 321 U. S. 321, 329 (1944), that the traditional concepts of equity jurisprudence applied to the Government's right to an injunction under the Emergency Price Control Act and that an injunction might accordingly be denied even if violation of the statute were clearly established.

Appellant's insinuation that the denial of equitable relief was based on "the time elapsed between the Commission's action and the filing of the complaint" (Jur. St. 14) is

a manifest distortion of the district court's action. What appellant chooses to ignore, but what the court found decisive, is the Justice Department's consistent and continued failure to oppose FCC approval of the challenged transaction,—despite the fact that the Department received prompt notification of and full information concerning its potential interest.

CONCLUSION.

The decision of the court below is clearly correct under long-established principles of law and equity.

The decision could not have any adverse effect on the Government's obligation to uphold and enforce the anti-trust laws and the policy underlying them. FCC denial of an application has the same effect as a judicial injunction against the transaction involved, while FCC approval has absolutely no bearing on the Government's right to proceed in an antitrust suit in a district court on the basis of any transaction, past or future, other than the specific one which the FCC has found to be in the public interest.

On the other hand, the Government's position in the present case would impose on private industry an unreasonable, intolerable and unjustifiable burden. Persons who, like NBC in the present case, had followed all prescribed requirements of law and had submitted their activities to the full scrutiny of appropriate Government regulatory agencies, would live in constant insecurity based solely on the possibility that another Government agency belatedly might seek to enforce, in a different tribunal, its contrary view of what the public interest demands on the very same set of facts.

Unless the law is so clear as to admit no possible escape, it cannot be held that a private person may be so penalized

Motion to Affirm

by governmental schizophrenia, particularly where no legitimate benefit to the national interest results and the Congress has provided a clear method of resolving intra-governmental conflicts without prejudice to the private citizen.

On both authority and reason, and as a matter of simple equity, the decision of Chief Judge Kirkpatrick dismissing the complaint is clearly correct. The present appeal, therefore, presents no substantial question for the decision of this Court, and the judgment of the district court should be affirmed.

Respectfully submitted,

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May 23, 1958.

APPENDIX A.

STIPULATION.

The parties hereby stipulate to the following statement for the purpose of any determination of the merits of defendants' third, fourth and fifth defenses herein, and for no other purpose, and stipulate that nothing contained in this stipulation shall be used as a basis for objection to the introduction of evidence at any trial of this action:

1. On May 16, 1955, National Broadcasting Company, Inc. ("NBC") entered into a written agreement with Westinghouse Broadcasting Company, Inc. ("WBC") under which, subject to the approval of the Federal Communications Commission ("FCC"), WBC would acquire the television and radio broadcasting facilities owned and operated by NBC in Cleveland, Ohio, NBC would acquire the television and radio broadcasting facilities owned and operated by WBC in Philadelphia, Pennsylvania, and NBC would pay WBC \$3,000,000. This is the agreement referred to in paragraph 21 of plaintiff's complaint. A copy of the agreement is attached to this stipulation as Exhibit A.

2. Before the agreement referred to in the preceding paragraph could be consummated, WBC and NBC were required by the Communications Act of 1934 (the "Act") to obtain approval of the proposed exchange from the FCC. Applications for such approval had to be filed with the FCC in a prescribed form setting forth detailed information, including the terms of the transaction and each party's reasons for requesting the transfer. Both parties filed such applications for FCC approval of the exchange on June 15, 1955.

3. Upon the filing of the applications, the FCC instituted a proceeding (hereinafter referred to as the "exchange proceeding"). During the course of the exchange proceeding the FCC conducted an extensive investigation of the proposed exchange and of the negotiations leading to it, including interviews with all WBC and NBC officials involved in the transaction, and others, and a detailed examination of the files, records and other relevant material, and complete reports of the investigation were prepared.

4. On August 12, 1955, the FCC notified the Department of Justice, Antitrust Division, that the WBC and NBC applications for approval of the exchange were pending before the FCC and that possible antitrust questions were raised by these applications.

5. On October 17, 1955, the FCC issued letters, pursuant to Section 309(b) of the Act, to WBC and NBC stating the various issues, including the antitrust issues, which the FCC believed were raised by the applications and as to which the parties were requested to furnish additional information. Three of the seven members of the FCC, favoring immediate grant of the applications, voted against issuance of the letters. The majority, however, felt that the applications should not be approved without further information.

6. On November 16, 1955, WBC and NBC each filed answers to the FCC's 309(b) letters, furnishing detailed data. In a joint letter of transmittal dated November 10, 1955, both parties urged the Commission to approve the exchange as being in the best interests of both companies and consistent with the public interest.

7. In considering and acting on the exchange applications, the FCC had before it the detailed information contained in the applications, the results of its extensive investigation and analysis, and the information contained in

the lengthy and detailed answers by WBC and NBC to the 309(b) letters. The FCC had before it all of the evidence relating to all of the antitrust issues presented by the complaint in this action.

8. In considering the proposed exchange, the FCC had a duty to and did consider whether the evidence before it showed any violation of the antitrust laws.

9. The FCC decided all issues relating to the exchange which it could lawfully decide.

10. On December 21, 1955, the FCC granted the exchange applications. Its action was a valid exercise of its jurisdiction and was taken pursuant to and in accordance with the Act and the FCC's own rules, regulations and policies. A copy of the public notice of the FCC action, issued December 28, 1955, including the separate statement of Commissioner Doerfer and the dissenting statement of Commissioner Bartley, is attached to this stipulation as Exhibit B.

11. Following the original notification to the Department of Justice on August 12, 1955 of the pendency of the exchange applications, the FCC and the Department of Justice conferred and exchanged information relating to the exchange, and the FCC kept the Department of Justice fully informed as to the evidence in the FCC's possession relating to the exchange and the status of the applications.

12. In the exchange proceeding, the Department of Justice had the right to request that the applications be set for a hearing under Section 309(b) of the Act, to request reconsideration of the FCC decision under Section 405 of the Act, to protest the FCC decision under Section 309(c) of the Act, and to obtain judicial review of the decision by appeal under Section 402(b) of the Act. At

no time did the Department of Justice exercise any of these rights.

13. On January 22, 1956, acting in reliance on the FCC's determination, WBC and NBC effected the exchange as approved and authorized by the FCC.

} /s/ Bernard M. Hollander,
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APPROVED this 1st day
of August 1957.

/s/ Kirkpatrick, Ch. J.

[Exhibits omitted.]

APPENDIX B.

COMPLAINT.

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, complains and alleges as follows:

I.

Jurisdiction and Venue.

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of that Act.

2. Each of the defendants transacts business and is found within the Eastern District of Pennsylvania.

II.

Definition of Terms.

3. As used herein:

(a) "Affiliate" means a television or radio station affiliated with a national television or radio broadcasting network.

(b) "Network time" means advertising time purchased on national networks of television or radio stations by national advertisers.

(c) "National spot advertising" means advertising time purchased on television or radio stations by national advertisers for broadcast during non-network time.

(d) "Local advertising" means advertising time purchased on television or radio stations by regional and local advertisers for broadcast during non-network time.

(e) "The eight primary markets" means the eight largest United States metropolitan areas in terms of both population and retail sales; namely, in order of size, New York City, Chicago, Los Angeles, Philadelphia, Detroit, Boston, San Francisco, and Pittsburgh.

(f) "Major market" means one of the fifty largest United States metropolitan areas in terms of both population and retail sales.

(g) "Station group" means a group of television and radio stations, under common ownership or control, which are located in and serve different major markets.

III.

Defendants.

4. Radio Corporation of America (herein referred to as RCA) is hereby made a defendant. RCA is a corporation organized and existing under the laws of the State of Delaware. It is engaged in the manufacture, sale and distribution of a full line of the products, parts and accessories used in the transmission and reception of television and radio signals. RCA has total annual revenues of about \$1,000,000,000.

5. National Broadcasting Company, Inc. (herein referred to as NBC) is hereby made a defendant. NBC is a corporation organized and existing under the laws of the State of Delaware. It is a wholly-owned subsidiary of defendant RCA, and is engaged in the business, among other things, of producing, selling and distributing television and radio programs and advertising. NBC furnishes network service to about 200 independent television stations and about 200 independent AM radio stations (and many com-

panion FM radio stations), as well as to the members of its owned and operated station group. The NBC station group consists of five very high frequency (herein referred to as VHF) television broadcasting stations, five standard amplitude modulation (herein referred to as AM) radio broadcasting stations, and four frequency modulation (herein referred to as FM) radio broadcasting stations. These stations are located in New York City, Chicago, Los Angeles, Philadelphia, San Francisco, and Washington, D. C. NBC has also acquired two ultra high frequency (herein referred to as UHF) television broadcasting stations in Buffalo, New York and New Britain, Connecticut. NBC acts as advertising sales representative for all members of its station group, as well as for some independently owned stations. Total revenues of NBC, including revenues from television and radio broadcasting, account for over 23% of RCA's total annual revenues.

IV.

The Trade and Commerce Involved.

6. The sale of advertising is essential to the operation of television and radio networks, station groups and broadcasting stations. Broadcast advertising is conveyed from the networks across state lines to television and radio stations throughout the United States, and is broadcast by television and radio stations across state lines to viewers and listeners throughout the United States.

7. Vigorous competition for national spot advertising and local advertising exists among networks, network station groups, independent station groups and independent stations. There is also competition among the networks, and between the networks and independent representatives, for representation of independent stations and station groups in the sale of national spot advertising.

8. Broadcast advertising requires and results in a continuous stream of commercial intercourse across state lines, including the collection and payment of fees for the sale of broadcast time, voluminous written and frequent verbal communications, and substantial amounts of advertising copy, recordings, transcriptions, films, contracts and checks.

9. Television networks originate network programming and advertising which they supply to broadcasting stations owned and operated by them and, pursuant to affiliation contracts, to broadcasting stations owned and operated by others. About 95% of all television stations in the United States are affiliated with one or more networks. Affiliation makes television station operations more profitable and is generally essential to the economic survival of television stations except in the three largest major markets. Time periods adjacent to popular network programs are particularly attractive to advertisers for local and national spot advertising. Station breaks, during which the broadcasting station is identified at regular intervals, provide valuable advertising for the station owner.

10. There are three national television networks: NBC, Columbia Broadcasting System (herein referred to as CBS), and American Broadcasting Company (herein referred to as ABC), each with about 200 affiliates. In 1954 the television broadcasting revenues of NBC and its owned stations were approximately \$120,000,000, of CBS and its owned stations approximately \$123,000,000, and of ABC and its owned stations approximately \$44,000,000. In 1955 these revenues were approximately: NBC—\$159,000,000, CBS—\$153,000,000 and ABC—\$54,000,000.

11. Television and radio stations are instrumentalities through which programs and advertisements are broadcast or transmitted across state lines to viewers and listeners in the respective market areas of such stations. In 1954 the

total revenue from the sale of broadcasting time on all United States television stations was approximately \$538,122,000. Of such revenue, network time sales accounted for approximately \$241,225,000 (45%), national spot advertising for approximately \$176,766,000 (33%) and local advertising for approximately \$120,131,000 (22%).

12. Products, parts and accessories used in the transmission and reception of television and radio signals are manufactured in many states of the United States and are sold and shipped by the manufacturers thereof, including RCA and Westinghouse Electric Corporation (herein referred to as Westinghouse Electric) in interstate commerce to wholesalers, retailers and other purchasers located in various states of the United States.

13. Philadelphia is the fourth market in the United States in terms of both population and retail sales. In this market, there are three VHF television stations: WRCV-TV (formerly WPTZ), owned and operated by and affiliated with NBC; WCAU-TV, owned by WCAU, Inc. and affiliated with CBS; and WFIL-TV, owned by Triangle Publications, Inc. and affiliated with ABC. RCA-Victor, the RCA manufacturing division, has its headquarters in Camden, New Jersey, and some of its largest plants are in the Philadelphia market area. Westinghouse Electric also has large plants in that area. Large quantities of the products, parts and accessories described in paragraph 12 of this complaint are produced by manufacturers, including RCA and Westinghouse Electric, in the Philadelphia market area, and from there are shipped to and sold in states of the United States other than the state of their manufacture.

14. Cleveland is the tenth market in the United States in terms of both population and retail sales.

V.

Background of the Offenses Charged.

15. In February 1954, the defendant NBC owned and operated the following VHF television stations:

WRCA-TV	New York	(market 1)
WNBQ	Chicago	(market 2)
KRCA	Los Angeles	(market 3)
WNBK	Cleveland	(market 10)
WRC-TV	Washington, D.C.	(market 11)

16. In August 1954, Westinghouse Broadcasting Co., Inc. (herein referred to as WBC), a wholly-owned subsidiary of Westinghouse Electric, owned and operated the following VHF television stations:

WPTZ	Philadelphia	(market 4)	NBC Affiliate
WBZ-TV	Boston	(market 6)	NBC Affiliate
KPIX	San Francisco	(market 7)	CBS Affiliate

WBC also was an applicant for VHF stations in Pittsburgh (market 8) and Portland, Oregon (market 20). WBC was the only non-network station owner with three VHF stations in markets 4 through 7. In this capacity, it was an important competitor of defendant NBC and other station owners for advertising in the eight primary markets.

17. Prior to December 1954, Allen B. DuMont Laboratories, Inc. owned and operated WDTV, the only VHF station in Pittsburgh, Pennsylvania (market 8), which station carried some programs of each of the networks CBS, ABC and the defendant NBC. On or about December 3, 1954, DuMont sold this station to WBC.

VI.

Offenses Charged.

18. Beginning about March 1954, and continuously thereafter to the date of the filing of this complaint, the de-

defendants RCA and NBC have been engaged in an unlawful combination or conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

19. The aforesaid combination or conspiracy has consisted of a continuing agreement and concert of action between the defendants RCA and NBC to obtain VHF television station ownership for NBC in five of the eight primary markets by the unlawful use of the power of the defendant NBC, as a network, to grant to or withhold from non-network station owners, NBC network affiliation for their television stations.

20. Defendants RCA and NBC have effectuated this combination or conspiracy in part by depriving WBC and Westinghouse Electric of WBC's VHF station in the Philadelphia market by the following means:

(a) Threatening to cancel or to refuse to renew WBC's affiliation with NBC in Boston and Philadelphia if WBC refused to negotiate with NBC for the transfer of its VHF station in Philadelphia to NBC;

(b) Withholding affiliation with NBC for a VHF station about to be acquired by WBC in Pittsburgh, until WBC agreed to transfer its VHF station in Philadelphia to the defendant NBC;

(c) Threatening to withhold affiliation with NBC for WBC's fifth VHF and two UHF stations when acquired.

21. On or about May 16, 1955, defendant NBC entered into a contract with WBC in unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act. This contract provided that:

(a) NBC would acquire the WBC television and radio broadcasting facilities in Philadelphia;

(b) WBC would acquire the NBC television and radio broadcasting facilities in Cleveland;

(c) NBC would pay WBC \$3,000,000.

On or about January 21, 1956, WBC and the defendant NBC exchanged the aforesaid facilities pursuant to this contract.

22. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

23. The effects of the aforesaid offenses, among others, have been and are:

(a) To reduce the ability of WBC as a station owner to compete with NBC and other station owners for the sale of advertising;

(b) To preclude competition among independent advertising representatives for representation of one of the VHF stations in the Philadelphia market;

(c) To preclude competition among station owners in the Philadelphia market for NBC network affiliation; and

(d) To reduce the ability of Westinghouse Electric to compete with RCA and others in the sale of equipment for the transmission and reception of radio and television signals.

Prayer.

WHEREFORE, plaintiff prays:

1. That the aforesaid combination or conspiracy and the aforesaid contract of May 16, 1955 be adjudged and decreed to be in violation of Section 1 of the Sherman Act.

2. That pursuant to the authority granted it by Section 4 of the Sherman Act, and by Section 313 of the Communications Act of 1934, as amended (47 U. S. C. § 313), the Court order such divestiture of the assets of the defendant NBC as the Court may deem necessary and appropriate.

3. That the plaintiff have such other and additional relief as may be proper.

4. That the plaintiff recover the costs of this suit.

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